IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 241 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SUREKHA RAKESH GOHAR - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR PM VYAS for Appellant.
MR KT DAVE, A.P.P. for Respondent-State.
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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE H.B.ANTANI

Date : 10/08/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE H.B.ANTANI)

Instant appeal filed under Section 374(2) of

the Code of Criminal Procedure, 1973, is directed against judgment dated November 19, 2003, rendered by the learned Additional Sessions Judge, 9th Fast Track Court, Rajkot, in Sessions Case No.10 of 2003, by which the appellant is convicted under Section 22(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 [“the NDPS Act” for short] and sentenced to suffer R.I. for ten years and fine of Rs. 1 Lakh, in default, R.I. for six months.

2. The facts emerging from the record of the case are as under :

Mr.V.M.Gohil, who was performing duties as P.S.I. in 'B' Division Police Station, Rajkot City, on 12.7.2003 at 17.15 hours received information from Constable Jignesh Mansukhlal that one lady wearing brown coloured Punjabi dress and white coloured dupatta was sitting near the Tea-Stall owned by one Satabhai and was dealing in brown-sugar. The information, which was received by Mr.V.M.Gohil, was reduced into writing by him in the station-diary. He thereafter informed the Deputy Commissioner of Police, Rajkot City about the same. Head Constable Yatidev Lalubha Jhala was asked to requisition services of two panch witnesses before embarking on a raid. The first part of panchnama was prepared before

conducting raid. Mr.V.M.Gohil thereafter along with panch witnesses and members of raiding party went to Thorala main road where tea-stall of Satabhai was situated. When the lady for whom information was received by Mr.Gohil was spotted, she was immediately approached. She was speaking in Hindi language. She was told that as per the information, as she was in possession of brown-sugar, search was required to be carried out of her person. On being asked about her name, she gave her name as Surekha, wife of Rakesh Gohar, residing at Bhaikhala, Bombay. Before effecting the search, Mr.Gohil informed the appellant that she could be searched in presence of a Magistrate or a Gazetted Officer, if so desired. However, the appellant declined the offer made by Mr.V.M.Gohil. Therefore, the person of the appellant was searched. On the search being conducted of her person, one plastic bag was found from her possession and on opening the plastic bag, one purse was found. On further opening the purse, four packets containing brown coloured substance was found, and prima facie it was having smell of brown-sugar. The officer from F.S.L. was called and constable Yogendra was sent to fetch him, but, officer of FSL was not available. A goldsmith was also summoned and A.S.I. Mr.Kantilal want to fetch goldsmith. In presence of goldsmith Sureshbhai Muljibhai Jokhia, the muddamal,

which was seized from the possession of the appellant was weighed. All the four plastic packets were weighed in the presence of panch witnesses. The weight of the muddamal articles was found to the tune of 237 Grams & 400 Milligrams. Thereafter, all the four packets containing muddamal articles were packed and the slip containing signatures of the panch witnesses was placed inside each of the plastic bags. The four packets were tied with twine on which, seal bearing “PI Rajkot City” was applied at the time of seizure of muddamal articles. The seizure-memo was served on the appellant. The certificate was issued by the goldsmith indicating weight of the muddamal which was recovered during the raid. The appellant was informed about the grounds of her arrest. The father of the appellant was also informed about the arrest of the appellant. Subsequently, the complaint was lodged against the appellant. Rest of the panchnama was prepared in the presence of panch witnesses during the course of raid. After completing the aforesaid formality, complaint, panchnama etc. and other material as well as muddamal which was seized, were handed over to P.S.O. The report under Section 57 of the NDPS Act was forwarded to Deputy Commissioner of police, Rajkot city by P.S.I. Mr.Gohil on 13.7.2003. As soon as offence was registered, the subsequent investigation was handed over to PSI

Mr.Dangar. During the course of investigation, statements of witnesses were recorded. The muddamal which was seized was sent to F.S.L. for the purpose of detailed analysis. The appellant was arrested. Report from F.S.L. which indicated that the substance analysed was brown-sugar was obtained.

3. On completion of investigation, the appellant was chargesheeted in the Court of learned Additional Sessions Judge, 9th Fast Track Court, Rajkot, on the basis of which, Sessions Case No.10 of 2003 was registered against her. The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh.7. It was read over and explained to her. She pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Vikramsinh Mangalsinh Gohil, PSI, as PW.1 at Exh.11, (2) Ranchhodbhai Bhanabhai Parmar as PW.2 at Exh.29, (3) Sureshbhai Muljibhai Jakhia as PW.3 at Exh.33, (4) Ramkumar Tapubhai Renuka as PW.4 at Exh.36, (5) Muljibhai Khojliyabhai Vasava as PW.5 at Exh.39, (6) Devdanbhai Becharbhai Dangar as PW.6 at Exh.42, (7) Rajubhai Venkteshwarrao as PW.7 at Exh.53, (8) Devkiben Rajubhai Venkteshwarrao as PW.8 at Exh.54, to prove its case against the appellant. The prosecution also produced

documentary evidence, such as, complaint given by Mr.V.M.Gohil on 12.7.2003 at Exh.21, report under Section 57 of the NDPS Act submitted by Mr.V.M.Gohil, PSI, to Deputy Commissioner of Police, Rajkot at Exh.22, panchnama of raid which was carried out at Exh.30, certificate issued by Sureshbhai Muljibhai Jakhia at Exh.34, entries regarding receipt of muddamal at Exhs.37 & 38, report of F.S.L. at Exh.45 etc., in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against her in the evidence of prosecution witnesses and recorded her further statement as required by Section 313 of the Code of Criminal Procedure, 1973. On behalf of the appellant, one defence witness Keshabhai Devshibhai Makwana was examined at Exh.58.

5. On appreciation of evidence adduced by the prosecution, the learned trial Judge held that the appellant has committed offence punishable under Section 22(b) of the NDPS Act and, therefore, sentenced her to suffer R.I. for ten years and imposed fine of Rs.1 Lakh, in default, R.I. for six months. Original accused No.2

i.e. Raju @ Nakta, son of Amarsing Gohar was acquitted, as case against him was not proved. The learned trial Judge also held that all the mandatory provisions of the NDPS Act were satisfactorily proved by the prosecution and involvement of the appellant in commission of the offence was also established by the prosecution beyond reasonable doubt. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 22(b) of the NDPS Act and imposed sentence referred to earlier by judgment dated November 19, 2003, giving rise to instant appeal.

6. Mr.P.M.Vyas, learned counsel appearing on behalf of the appellant, submitted that the appellant was not searched as provided in sub-section (4) of Section 50 of the NDPS Act by a woman police officer and thus, there is violation of the provisions contained in Section 50 of the NDPS Act and, therefore, benefit of the same is required to be given to the appellant. It is further submitted by the learned counsel that the police officer, who embarked on the search of person of the appellant, has not been examined in the present case and, therefore, the entire procedure stands vitiated. The learned counsel submitted that as both the panch witnesses, in whose presence search of person of the appellant was carried

out and muddamal was seized, have not been examined by the prosecution to establish involvement of the appellant in the commission of the offence, it raises doubt, therefore, benefit of the same is required to be given to the appellant. The learned counsel of the appellant submitted that muddamal was weighed by Sureshbhai Muljibhai Jakhia, who is an illiterate person and who has given certificate regarding weight of muddamal. It is contended by the learned counsel that Sureshbhai Muljibhai Jakhia has merely signed the panchnama and there is lacuna in the procedure of weighing of muddamal articles and, therefore, benefit of the same is required to be given to the appellant. The learned counsel submitted that Sureshbhai Muljibhai Jakhia has no where stated in his testimony that he was having a licence of goldsmith and this also raises doubt about weighing procedure followed by the prosecution and benefit of the same is required to be given to the appellant. It was contended by the learned counsel that the procedure of sealing of the muddamal articles was defective. As the sealing procedure was defective, tampering with the muddamal articles cannot be ruled out, therefore, benefit of the same be given to the appellant. The learned counsel argued that the learned trial Judge has not appreciated the entire evidence adduced on behalf

of the prosecution in its true perspective and, therefore, considering the entire gamut of oral deposition and the documentary evidence adduced by the prosecution, the appeal should be allowed. It was contended by the learned counsel that the prosecution has miserably failed to prove involvement of the appellant in the commission of the offence and, therefore, benefit of the same be given to the appellant.

7. Mr.K.T.Dave, learned A.P.P. representing the State vehemently submitted that the learned trial Judge has taken into account the entire gamut of oral deposition as well as the documentary evidence, and has rightly recorded conviction of the appellant for the offence punishable under Section 22(b) of the NDPS Act. The learned A.P.P. further submitted that all meticulous care was taken by the prosecution at the time of conducting raid and there was no violation of mandatory provisions contained in the NDPS Act. It was emphasised by the learned counsel for the State that the trial Judge has rightly come to the conclusion that the prosecution has proved its case beyond reasonable doubt qua the appellant and as the appellant has been rightly convicted by the learned trial Judge, conviction of the appellant requires to be upheld by this Court. The learned counsel

of the State asserted that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 22(b) of the Act, and as the learned counsel of the appellant has failed to dislodge them, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Mr.P.M.Vyas, learned counsel of the appellant, and Mr.K.T.Dave, learned A.P.P., at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. As per the prosecution case, Vikramsih Mangalsinh Gohil, who was discharging duties as a PSI at `B' Division Police Station, Rajkot City, received information on 12.7.2003 at 17.15 hours from constable Jignesh Mansukhlal that one lady wearing brown coloured Salvar-kamij and having white coloured dupatta, was sitting near the tea-stall of Satabhai. She was dealing in brown-sugar. She was in possession of large quantity of brown-sugar and had come to sell brown-sugar in Kundaliapara. The information received by Mr.V.M.Gohil

was noted down in the station-diary and thereafter it was forwarded to D.C.P. Rajkot City. As raid was required to be carried out, Head Constable Yatidev Jhala was told to requisition services of two panch witnesses. The first part of panchnama was thereafter prepared and the panch witnesses had put their signatures therein. The raiding party thereafter went to the place situated on Thorala main road near the tea-stall owned by Satabhai. On reaching the tea-stall, one lady was noticed sitting near the tea-stall. On being accosted by the raiding party, she gave her name as Surekha, wife of Rakesh, residing at Bhaikhala, Bombay. As per the testimony of Mr.Gohil at Exh.11, she was thereafter informed about the information received by him that she was having brown-sugar in her possession. She was also told that search of her person was required to be carried out. She was further informed by Mr.Gohil that if she wanted to have the search in the presence of a Gazetted Officer or a Magistrate, then she can avail of that option. She had declined the offer of Mr.Gohil. Thereafter, search of her person was carried out in the presence of other members of the raiding party. On the search of her person being carried out, one plastic bag was recovered from her possession. On further search of the plastic bag, one purse was found and on opening the said purse, four plastic packets were found.

Each plastic packet was having brown coloured substance and prima facie it was having a smell of brown-sugar. The officer of F.S.L. was summoned, but, he was not available. The goldsmith was also summoned to weigh the muddamal. It was weighed by the goldsmith in the presence of panch witnesses. The muddamal, which was seized, was kept in four different plastic bags and was tied with twine and seal of `PI Rajkot City' was applied on each of the plastic bag. The appellant was given seizure memo. The certificate of muddamal weighed by the goldsmith was obtained from him. The appellant was arrested and she was informed about the grounds of arrest. The copy of arrest memo was given to her. The remaining part of panchnama was completed on the spot. The complaint was given by Mr.Gohil. After completion of panchnama, muddamal articles were handed over to PSO for taking necessary action. The testimony adduced by Mr.V.M.Gohil is corroborated by document at Exh.13, which is the information received, the complaint at Exh.21, the arrest memo of the appellant at Exh.19, the report forwarded to Deputy Police Commissioner about the information vide Exh.13 and under Section 57 of the NDPS Act vide Exh.22.

10. Devdanbhai Becharbhai Dangar, PW.6, has been

examined at Exh.42. He was entrusted investigation in connection with C.R.No.I.5/2003 by the Police Officer of 'B' Division Police Station. He was handed over a forwarding letter, complaint filed by Mr.V.M.Gohil at Exh.21, panchnama of search and seizure at Exh.30, information report at Exh.13, report under Section 50 at Exh.14, yadi sent to F.S.L. at Exhs. 15 & 16, certificate given by goldsmith regarding weight of muddamal, seizure-memo at Exh.17, grounds of arrest communicated to the appellant at Exh.18, arrest-memo of the appellant at Exh.19 etc. As per his say, he recorded the statement of Satabhai Bharvad. He has stated in his testimony that the muddamal was sent to F.S.L. on 13.7.2003 in sealed packets through police constable Muljibhai and receipt in that regard was issued by F.S.L. Office at Exh.40. The analysis report submitted by F.S.L. indicating the seized muddamal as brown sugar is at Exh.45 in the present case. During the course of investigation, he obtained necessary permission to visit Bombay, as he came to know during the course of investigation that the muddamal was obtained by the appellant from Raju @ Nakta Gohar. He had also recorded statement of Devkiben and the father and mother of Devkiben during the course of investigation. Raju Gohar was detained on 5.9.2003 from Bombay and by transfer warrant he was brought to Rajkot and after

obtaining remand, interrogation of accused Raju @ Nakta, son of Amarsing Gohar was carried out.

11. It has been strenuously contended by the learned advocate representing the appellant that the provisions contained in Section 50 of the NDPS Act have not been complied with while conducting search of the person of the appellant. In the decision rendered by the Supreme Court in **State of H.P. vs. Pawan Kumar, (2005)4 SCC 350,** it has been observed by the Supreme Court as under :-

> *"A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried*

like hand, shoulder, back or head etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

In view of the ratio laid down by the Apex Court in the aforesaid decision, there is no breach of the provisions of Section 50 of the NDPS Act as contended by the learned advocate of the appellant, as the search of plastic bag, which was in possession of the appellant, was carried out.

12. It is further contended by the learned advocate on behalf of the appellant that the sealing procedure was defective and as sealing procedure was not followed properly by the investigating agency, tampering of muddamal articles cannot be ruled out. In order to appreciate the aforesaid contention , we have perused the deposition adduced by Mr.V.M.Gohil, PW.1 examined at Exh.11. In his deposition, in Para-7, he has stated that one goldsmith named Sureshbhai was called through ASI Kantibhai for the purpose of weighing the muddamal articles. On weighing the muddamal articles, the weight was found to the tune of 237 Grams & 400 Milligrams. Thereafter, all the four plastic packets containing brown sugar were tied with twine and were placed in different

plastic bags. The slip bearing signatures of the panch witnesses were also placed therein. Thereafter, seal of “PI Rajkot City” was applied on each of the plastic bags. Normal procedure of sealing the muddamal articles with heat Seal was not followed in the present case. Panch witness Ranchhodbhai Bhanabhia Parmar, PW.2, examined at Exh.29, has turned hostile. But, if we peruse the deposition given by him, then it becomes clear that the muddamal article seized during the course of raid was tied with twine and kept in four different plastic bags and thereafter it was sealed on the spot. The deposition given by Mr.Muljibhai Vasava, PW.5 at Exh.39 is also perused by us. On perusal of his deposition, it becomes clear that the muddamal was received by him from Writer Ramkumar Tapubhai Renuka in a sealed packet for the purpose of sending the same to F.S.L. for detailed analysis. In his cross-examination he has deposed that the Office of F.S.L. gets closed at 6.00 O'clock in the evening. He could not reach the F.S.L.Office, therefore, he stayed over-night in the Police Chowky situated near FSL Office. During the said period, he kept the muddamal article in his possession in a purse. He has also deposed in his cross-examination that muddamal Article No.2 containing measurements, was not kept by him. He has further deposed that on four packets, one seal was

affixed and each plastic packet was tied with twine. He has further deposed in his cross-examination that he had not made any noting with regard to his over-night stay at the Police Chawky. As per his deposition, there was no strong-room in the Police Chowky where he stayed over-night. He knew that muddamal, which was with him, was brown sugar and it was seized from the vicinity of Thorada Police Station where he was working. The muddamal article received by F.S.L. has been mentioned in the report at Exh.45. It has been mentioned in the report of F.S.L. that muddamal bearing Mark A, B, C & D each having different slip and tied with twine, was received and had a seal of 'PI Rajkot City'. The procedure followed by the raiding party while seizing the muddamal articles and sealing the same, thus, raises a doubt about the sealing procedure adopted by the prosecuting agency. The substance as per the evidence on record was weighed in two different places (1) Police Station and (2) at the place of incident and it raises the doubt of tampering of muddamal articles. Even the procedure for weighing the muddamal was not scrupulously followed by the prosecuting agency and the lacunae is amply reflected in the evidence on the record of the case. The muddamal articles are generally sealed by hit seal and the seal of concerned Police Station is required to be applied. It is also

required to be kept in the strong room. But, this procedure was not meticulously followed.

Thus, in view the aforesaid discussion, the procedure for sealing the muddamal articles, weighing procedure, etc. was, in our view, defective and when the entire procedure is defective, tampering of muddamal articles cannot be ruled out, and benefit of the same is required to be given to the appellant.

13. In view of the aforesaid facts and circumstances of the case and on perusal of the entire oral deposition as well as documentary evidence, the contention raised by the learned advocate of the appellant that the procedure for sealing the muddamal article seized during the course of raid, was not followed properly, requires to be upheld. As discussed in the earlier part of the judgment, since the possibility of tampering with the muddamal articles cannot be ruled out, contention raised by the learned advocate of the appellant regarding defective sealing procedure has merits and, therefore, we uphold the contention raised by him. Thus, on the short question of defective sealing procedure of muddamal article, the appeal deserves to be allowed. The learned advocate for the appellant has not raised any other

contention.

For the foregoing reasons, the appeal succeeds. Judgment dated November 19, 2003, passed by the learned Additional Sessions Judge, 9th Fast Track Court, Rajkot, in Sessions Case No.10 of 2003 is hereby set aside. The appellant is acquitted of the offence punishable under Section 22(b) of the NDPS Act. The respondent is directed to set at liberty the appellant forthwith, if his presence is not required in any other case. Muddamal to be disposed of in terms of directions given by the learned trial Judge in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

(patel)